Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1529

DONALD C. INGRAM AND JOHN C. INGRAM

Petitioners,

v.

CHAMPLIN PETROLEUM COMPANY AND TRUSTS CREATED BY THE LAST WILL AND TESTAMENT OF JAY P. WALKER, DECEASED, ET AL

Respondents.

PETITION OF INGRAMS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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April 17, 1978

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IN THE

Supreme Court of the United States

October Term, 1977

No. _____

DONALD C. INGRAM AND JOHN C. INGRAM
Petitioners,

v.

CHAMPLIN PETROLEUM COMPANY, *and*
TRUST B CREATED BY THE LAST WILL AND TESTAMENT OF JAY P. WALKER, DECEASED, *and* THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA
ROSS T. WARNER AND HORACE D. BALLAINE, *as Trustees thereof*;
TRUST C CREATED BY THE LAST WILL AND TESTAMENT OF JAY P. WALKER, DECEASED *and* THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, ROSS T. WARNER AND HORACE D. BALLAINE, *as Trustees thereof*;
CHARITABLE TRUST CREATED BY PARAGRAPH 6 OF ARTICLE I OF THE LAST WILL AND TESTAMENT OF JAY P. WALKER, DECEASED, *and* THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, ROSS T. WARNER *and* HORACE D. BALLAINE, *as Trustee thereof*;
DONNA JO COOPER;
MARTHA WALKER STURTEVANT TRUST *and* THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, *as Trustee thereof*;
GUY O. MARCHANT;
CAROL JEAN WALKER, *a minor, and*
JUDITH WALKER, *Guardian of her Estate*;
MARTHA WALKER STURTEVANT;
WARNER INVESTMENT COMPANY, *an Oklahoma Corporation;*
NONA C. SHUDDE ANNUITY TRUST AND DOUGLASS D. HEARNE, *as Trustee thereof; and*
THE ESTATE OF W. F. KNODE, DECEASED, *and*
MARGARET KNODE AND RALPH WILL, *Executors thereof;*
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable Supreme Court of the United States: The petitioners, DONALD C. INGRAM and JOHN C. INGRAM, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit rendered in these proceedings on August 12, 1977, and to review the Denial by that Court of the Petitioners' Motion for Rehearing, rendered in these proceedings on February 6, 1978, and to bring before the Supreme Court the case of Champlin Petroleum Company, Appellee-Plaintiff v. Donald C. Ingram and John C. Ingram, Appellants-Defendants, and Trusts Created by the Last Will and Testament of Jay P. Walker, deceased, et al., Appellees-Defendants.

OPINIONS BELOW

The opinion of the United States Court of Appeals, for the Tenth Circuit, is reported at 560 F. 2d 994 and appears at Appendix A, *infra*, pp. 1a. The Order of the United States Court of Appeals for the Tenth Circuit Denying Motion for Rehearing, as yet unreported, appears at Appendix B. *infra*, pp. 8a. The two (2) opinions and judgments of the United States District Court for the Northern District of Oklahoma, one dated March 16, 1976 and other dated April 2, 1976, as yet unreported, affirmed by the opinion of the United States Court of Appeals for the Tenth Circuit sought to be reviewed here, appears at Appendix C, *infra* pp. 9a.

JURISDICTION

The date of the filing of the Judgment of the Tenth Circuit U.S. Court of Appeals in this case was August 12, 1977. The Order Denying Motion for Rehearing of the United States Court of Appeals for the Tenth Circuit

was entered on February 6, 1978. See Appendix B, *infra*, pp. 9a. This petition for certiorari was filed less than 90 days from the date aforesaid.

The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by Act of Congress June 25, 1948, Chapter 646, 62 Stat. 928 (28 *U.S.C.* †1254 (1).

The United States Court of Appeals for the Tenth Circuit decided questions of substance involving matters of law erroneously.

It is believed the following cases sustain the jurisdiction of this court to issue its writ of certiorari:

> *Gay v. Ruff*, 54 S. Ct. 608, 292 U.S. 25, 78 L. Ed. 1099.
>
> *Electrical Fittings Corp., et al., v. Thomas & Betts Co., et al.*, 59 S. Ct. Rep. 860, 307 U.S. 241, 83 Ed. 1263.
>
> *Worcester County Trust Co. v. Riley*, 58 S. Ct. 1985, 302 U.S. 22, 82 L. Ed. 2689.

QUESTIONS PRESENTED

1. Do United States District Courts enjoy a measure of discretion in the matter of granting or withholding interpleader relief?

2. Does the existence of an equivalent adequate remedy in a case already pending in a state court, in which all of the relief sought in the District Court could be obtained in a single simple procedure in the state court, authorize the exercise of discretion to refuse relief under 28 *U.S.C.* †1335?

3. May a cause pending in a state court of Texas be removed therefrom to the United States District Court for the Northern District of Oklahoma by way of a proceeding under 28 *U.S.C.* †1335?

4. Did the Tenth Circuit U.S. Court of Appeals err

in holding that the U.S. District Court must determine the issues in interpleader suit filed by Champlin even though in a prior filed and pending suit in a state court in Texas in which Champlin had already filed an unconditional answer, and the law of Texas provides another more appropriate, more suitable and more effective remedy, and that under such circumstances the District Court, after becoming familiar with the pleadings and after hearing the statements of the respective parties as to the facts, cannot, in its discretion, refuse to entertain a bill for interpleader?

5. Did the Tenth Circuit U.S. Court of Appeals misconceive the source of liability of Champlin Petroleum Company to Petitioners as being a mere stakeholder instead of in reality being a Real Party in Interest as lease-operator?

6. Did the Tenth Circuit U.S. Court of Appeals misconceive the law in holding that the 94th District Court of Nueces County, Texas, could not determine the liability of Champlin Petroleum Company to Petitioner, when Champlin had already filed an unconditional answer to Petitioners' suit in the state court prior to Champlin's filing the instant interpleader action?

7. Did the Tenth Circuit U.S. Court of Appeals err in holding that a cause may be removed from the state court of Texas to a federal court in Oklahoma by way of an interpleader action when such cause was not otherwise removable under the removal statutes and thereby attempts to enlarge the jurisdiction of federal courts beyond the limits prescribed by the removal acts, and the adjudicated cases under 28 *U.S.C.* †1335?

8. Did the Tenth Circuit U.S. Court of Appeals err in holding that the issue of the adequacy of the state remedy was not raised at the trial court level and could not be considered on appeal?

9. Did the Tenth Circuit U.S. Court of Appeals err in holding that it was not erroneous for the District Court below to find the royalty provisions to be ambiguous as to the applicable section of the underlying agreement for residue gas?

10. Did the Tenth Circuit U.S. Court of Appeals err in holding that the suit in interpleader in a Federal District Court by one alleging to be a mere stakeholder, on only one of two distinct claims involved in a state court action, was sufficient cause to remove and stay the entire pending state court action?

STATUTES AND RULES INVOLVED

28 *U.S.C.* †1335 is reprinted at length in Appendix D hereto. Federal Rule of Civil Procedure 22 is reprinted at length in Appendix E hereto.

STATEMENT OF THE CASE

The facts relevant to the questions presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

FIRST: On July, 1974, Petitioners herein filed suit in cause 74-2242-C in 94th District Court of Nueces County, Texas, against Champlin Petroleum Co. as the working-interest owner and operator of an Oil, Gas & Mining Lease on Their (Ingram's) land in Nueces County, Texas. Suit alleged that from 1-1-57 through 6-30-74, Champlin had produced and sold more than 65,500,000 MCF of residue gas upon which it had paid Ingrams 10% at various rates of less than 12¢ per MCF to 14.435¢ per MCF when petitioners' lease agreements called for 12.5% of market price and alleged a market price of 19¢ per MCF. It showed that Champlin owed Ingrams more than $709,049. for the shortage of the market prices and the 2.5% royalty differential for gas produced through June 30, 1974. The suit also showed that from July 1, 1965, through June 30, 1974, Champlin had extracted and sold more than 552,693 bbls. of fluid hydrocarbons for which it had paid Ingrams' 10% royalty at varying prices of less than the market price provided by their lease agreements and

thereby owed Ingrams an additional $66,565. for such price shortage through June 30, 1974. It also prayed for any continuing damages to Ingrams' minerals still in place in the ground.

SECOND: Citation was duly issued and served on Champlin and it mailed its answer to the District Clerk of Nueces County, Texas. On August 8, 1974, after having been served and making its answer: Champlin's Answer was received and filed in said Cause 74-2242-C in 94th District Court of Nueces County, Texas. Said Answer consisted of an unconditional General Denial and contained no challenge of the jurisdiction of said state court over the subject matter or over Champlin as to the allegations of said suit. THAT answer appears in full in Apx. G, being copied from Tr. 84-5.

THIRD: Sometime on Aug. 8, 1974, and after having filed its unconditional answer in said Cause 74-2242-C to District Clerk of Nueces County, Champlin filed the instant interpleader action, under sworn oath, in the U.S. District Court for the Northern District of Oklahoma, at Tulsa, alleging the prior existence of the Texas suit but failing to tell the U.S. District Court that it had already unconditionally appeared in said Texas suit and submitted to its jurisdiction. In the instant interpleader action Champlin tendered into Court $1,-664.21 which it swore was all the monies it had in its possession which were in dispute and which $1,664.24 was for the 2.5% of the residue gas "for months of May and June, 1974", but it failed to tell the U.S. District Court that the Texas suit already claimed the May and June, 1974, production and it also failed to inform the said Court that it also had more money in its possession for the 2.5% disputed residue gas for months of Feb., March and April of 1974. The sworn interpleader also failed to state the price at which the tendered royalties were calculated and failed to inform said court that the Texas suit also claimed the 2.5% difference at the market price of 19¢ per mcf instead of the 14.435¢ paid into the Court in the instant interpleader.

Champlin's action was based upon the U.S. Interpleader Statute (28 *U.S.C.* †1335); and also upon diversity of citizenship as defined in 28 U.S.C. 1332. There has been no question raised as to diversity of citizenship. THE question is: can Champlin stop the prior state court's jurisdiction and remove the several claims to Federal Court by depositing a fraction of the disputed funds into a U.S. District Court under †1335 Interpleader action which has only the power to decide only a portion (May and June, 1974's 2.5% difference based on whatever Champlin said the price was) of matters in controversy in the Texas Court?

FOURTH. Champlin's interpleader action sought and was granted an "Order Restraining Institution Or Prosecution Of Proceedings" (Apx. C(2), pg. 22a hereof) against Ingrams, who vigorously objected to the Trial Court's actions for all reasons in their Sept. 10, 1974 "Motion To Dismiss The Complaint and/or Dissolve the Restraining Order" but such was finally overruled on March 13, 1975, as shown by Apx. C(3). Accordingly the U.S. District Court effectively stopped all action by the Texas court until its March 16, 1976, judgment wherein it readily conceded that the said restraining order should be, and was, dissolved. However the erroneously granted restraining order was based upon the Oklahoma U.S. District Court's decision, unfavorable to Petitioners Ingrams, that the "division orders", in dispute in the Texas case and the interpleader action as having been obtained by fraud, were valid and binding on the parties. Although the Oklahoma Court's decision covered only the "deposited funds" its determination of a factual question without Ingrams ever having a chance for a jury trial can be used to argue against Petitioners' rights to proceed in the Texas case.

FIFTH. Opinions of both lower courts show they were impressed that some liquids were extracted from the gaseous mixture which flowed from the well head and that they decided that the remaining material

(residue gas) was "dry" gas although such terminology was opposite the definitions set out in the contractual agreements and contrary to the only evidence (witness) on the point and contrary to the statutory law of State of Texas—See Apx. F-Art. 6008(f), pg. 33a.

REASONS FOR GRANTING THE WRIT

1. The scope of 28 U.S.C.A. †1335 and the meaning of Rule 22 of the Rules of Civil Procedure for the District Courts of the United States are both here involved.

Both are in the foreground of developing tendencies of the law and are of great general importance and interest and their application to cases involving proceedings in state courts should be determined and settled by this Court.

Both 28 *U.S.C.A.* †1335 and Federal Rule of Civil Procedure 22 are appended hereto as Appendices D and E, respectively. The procedural decisions of this Court and other, lesser federal courts as enumerated *infra*, as well as indicating error in this case, as described *infra*, spotlight the confusion and consternation on the part of lesser federal courts in deciding procedural questions in cases concerning both 28 *U.S.C.A.* †1335 and Federal Rule of Civil Procedure 22. Therefore, this Honorable Court should use the opportunity this case presents to clarify the meaning and effect of these two provisions governing federal courts.

2. The opinion of the Court of Appeals is in conflict with the Second, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits; and said conflict should be heard and determined by this Court.

Aetna Casualty & Surety Co. v. Quarles, 92 F. 2d 321 (4th Cir. 1937), *State Farm Mutual Insurance Co. v. Hugee, et al.*, 115 F. 2d 298 (4th Cir. 1940), *Southern California Petroleum Corp. v. Harper*, 273 F. 2d 715 (5th Cir. 1960), *American Automobile Insurance Co. v. Freundt*, 103 F. 2d 613 (7th Cir. 1939), *TRW Inc. v. Ellipse Corp.*, 495 F. 2d 314 (7th Cir. 1974), *Thompson v. Moore*, 109 F. 2d 372 (8th Cir. 1940) and *Shell Oil Co. v. Frusetta*, 290 F. 2d 689 (9th Cir. 1961), have all held that this type of federal court interference in ongoing state actions is impermissible. Since this case involves a question of ownership of royalty interests in mineral rights: *Hickok v. Gulf Oil Corp.*, 265 F. 2d 798 (6th Cir. 1959) is applicable. While that case held that comity required that the first court with actual or constructive possession of the property in dispute (in that case also a Texas State Court) should be allowed to retain control of the property and to proceed to judgment; the present decision sought to be reviewed took a contrary position. A similar decision on comity and limitations of subject matter jurisdiction, *Humble Oil and Refining Company v. Copeland*, 398 F. 2d 364 (4th Cir. 1968), is at odds with the decision below sought to be reviewed here.

Moreover, compounding the error below is the fact that the Court decided as it did on the procedural issues in spite of the Petitioners' protest that: 1) Champlin Petroleum Company was a Real Party in Interest, and not a mere stakeholder; and 2) it did not deposit all disputed funds in its possession at the time of the institution of the suit (as it later admitted in its appellate brief) and to which it had no claim of its own. This conflicts with the following decisions: *National Surety Corp. v. Globle Indemnity Co.*, 331 F. Supp. 208 (E.D. Pa. 1971), *Metal Transport Corp. v. Pacific Venture Steam Corp.*, 288 F. 2d 363 (2d Cir. 1961), *Great American Ins. Co. v. Bank of Bellevue*, 366 F. 2d 289 (8th Cir. 1966), *New York Life Ins. Co. v. Hannon*, 280 F. Supp. 291 (D. Ore. 1967), *Prudential Ins. Co. of America v. Bennett*, 209 F. Supp. 451 (S.D. Ga. 1969).

3. The Court of Appeals has decided an important question of federal law in a way in conflict with applicable decisions of this Court.

Since 1849 this Court has held that "where the jurisdiction of a court, and the right of the plaintiff to pro-

secute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For, *if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable for contempt in one, if they dare to proceed in the other.*" *Peck v. Jenness*, 7 How. 612, 624, 12 L. Ed. 841 (U.S. Sup. 1849). The italics were added by the Supreme Court of Texas in *Cleveland v. Ward*, 285 S.W. 1063, 1071 (Tex. Sup. 1926) when it quoted and followed this Court's landmark case of *Peck v. Jenness*. The Court Of Appeals opinion in this case is in conflict with said landmark case.

Brillhart v. Excess Ins. Co. of America, 86 L. Ed 1620, 62 S. Ct. 1173, 316 U.S. 491 (on writ of certiorari to the 10th Cir. 1942) is squarely in point and the Court of Appeals opinion is in conflict with that case.

4. The Court of Appeals has decided a question of federal law in a way probably in conflict with other decisions of that Court itself, and with other courts within the Tenth Circuit.

Under the rule of *Holcomb v. Aetna Life Ins. Co.*, 228 F. 2d 75 (10th Cir. 1955) the complainant Champlin did not act in good faith: the restraining state court action was arbitrary and capricious: the instant decision conflicts with *Miller and Miller Auctioneers, Inc. v. G. W. Murphy Industries, Inc.*, 472 F. 2d 893 (10th Cir. 1973). The instant decision also conflicts with *Knoll v. Socony Mobil Oil Co., Inc.* 369 F. 2d 425 (10th Cir. 1966), *cert. den.* 386 U.S. 977, *Baber v. Texas Utilities Co.*, 128 F. Supp. 753, *aff'd.* 228 F. 2d 665 (D. Tex. 1955, 10th Cir.), *Carter v. City of Fort Worth*, 456 F. 2d 572 (10th Cir. 1972), *cert. den.*, 409 U.S. 877, 93 S. Ct. 128, *Lewis v. Schrader*, 287 F. 893 (10th Cir. 1923), *Kane v. National Sur. Corp.*, 94 F. Supp. 605 (D. Tex. 1951), *Kay v. Home Indem. Co.*, 337 F. 2d 898 (10th Cir. 1964), and *Southern Cal. Petroleum Corp. v. Harper*, 273 F. 2d 715 (5th Cir. 1960).

Its upholding the Trial Court's opinion that the "residue gas" was the same as the wording "dry gas" on stubs sent to Petitioners conflicts with the *only* evidence and with the definition of "Dry Gas" as set out by Art 6008 (f) of Texas Revised Civil Statutes (Apx. F). The only evidence on the point was by a witness who testified that the residue gas was not "dry gas" and by the contract agreement which specifically defined "residue gas" as the material remaining after it had been passed through the operator's processing plant. The courts ignored the only evidence and listened to arguments of lawyers.

Thus, the decision sought to be reviewed so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by the lower U.S. District Court, as to call for an exercise of this Court's power of supervision.

5. The Court of Appeals has decided a question of local law in a way that conflicts with its own and other local decisions.

Its holding that the division order in question was a binding contract until revoked conflicts with its own contrary holding in *Craig v. Champlin*, 300 F. Supp. 119, (U.S.D.C. Okla., 1969) aff'd 421 F. 2d 236 (10th Cir. 1970). Its said holding also conflicts with the Texas courts which follow the reasoning of the 10th Circuit—such as *Butler v. Exxon Corp.*, 559 S.W. 2d 410, 416 (Tex. Civ. App. Dec. 14, 1977—no writ history).

Its holding on procedure conflicts with the following applicable Texas decisions: *Ackerman v. King*, 29 Tex. 291 (1867); *Lewis v. Pitts*, 275 S.W. 473 (Tex. Civ. App. 1925/w/ dism'd.) following *Kline v. Burke Const. Co.*, 269 U.S. 226, 67 L. 226, 24 A.L.R. 1077; and *Cleveland v. Ward*, 285 S.W. 1063 (Tex. Sup. 1926) following *Peck v. Jenness*, 7 How. 612, 12 L. Ed. 841 (U.S. 1849).

This conflict is an affront to and an assault upon comity of the court as such doctrine has long been recognized by this Court.

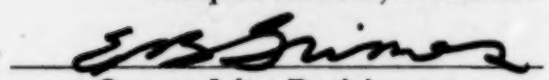
CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals For Tenth Circuit in this case.

Respectfully submitted,

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By 
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April, 1978

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APPENDIX A

United States Court of Appeals

TENTH CIRCUIT

No. 76-1427

CHAMPLIN PETROLEUM COMPANY

Appellee,

v.

DONALD C. INGRAM AND JOHN C. INGRAM

Appellants,

TRUST CREATED BY THE WILL AND TESTAMENT OF JAY P. WALKER, DECEASED, ET AL,

Appellees.

Appeal From the

United States District Court
For The Northern District
Of Oklahoma
(D.C. #74-C-320-C)

John M. Imel, Tulsa, Oklahoma (E. B. Grimes, Robstown, Texas, and Moyers, Martin, Conway, Santee & Imel, of Counsel, Tulsa, Oklahoma, with him on the Brief), for Appellants.

Frederic Dorwart, Tulsa, Oklahoma (J. Michael Medina, Tulsa, Oklahoma, and Holliman, Langholz, Runnels & Dorwart, Tulsa, Oklahoma, and David L. Motloch, Champlin Petroleum Company, Fort Worth, Texas, of Counsel, with him on the Brief), for Appellee Champlin Petroleum Company.

Horace D. Ballaine, Tulsa, Oklahoma (Conner, Winters, Ballaine, Barry & McGowen, Tulsa, Oklahoma, of Counsel, with him on the Brief), for Appellees, Trust B Created by the Last Will and Testament of Jay P. Walker, Deceased, et al.

Before SETH and HOLLOWAY, Circuit Judges, and CHILSON*, Senior District Judge.

SETH, Circuit Judge.

This statutory interpleader action was brought by Champlin Petroleum Company to resolve a dispute between the royalty owners and the working interest owners as to the amount of royalties to be paid on the sale of residue gas from an oil and gas lease. The dispute centers on the language of the royalty provisions of the supplemental lease, and the question is whether the royalty on the residue gas is one-eighth or one-tenth.

The case was tried to the court which found the lease to be ambiguous as to the royalty on the residue gas, but that the parties by their course of conduct had interpreted this provision. Based on division orders between Champlin and the Ingrams, as royalty owners, Champlin had been paying a one-tenth royalty on the residue gas until this dispute arose, and the division orders were cancelled.

The retained funds were thus awarded to the working interest owners. The Ingrams, as royalty owners, have taken this appeal, asserting that the court lacked jurisdiction, and erroneously interpreted the royalty provision.

In 1936, Donald M. Ingram, father of the appellants, as trustee, gave to W. F. Knode, the basic oil and gas lease which provided for a one-eighth royalty. In 1941, Process Oil Company, successor to Knode's interest, and Donald M. Ingram, as trustee, entered into a supplemental lease and agreement under which land was added to the original tract. The supplemental lease also provided for different gas royalty depending on wheth-

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* Of the District of Colorado,
Sitting by Designation.

er or not the gas was processed by a recycling plant. This recycling process would only occur if it was profitable. These royalties were set at one-tenth for gas and its products which were processed, and one-eighth for gas sold at the well. The original lease was thus amended to conform to this provision.

In 1943, Process assigned its lease in the oil rights, and entered into a purchase contract and processing agreement for the gas with the Chicago Corporation (now merged into Champlin Petroleum Company). Under this gas agreement, Champlin's predecessor would extract products from the gas and return the residue gas to a gas reservoir underlying or common to the leased premises. Process Oil Company was liquidated, and its interests are now represented by the heirs of Trust B created by Walker.

The processing agreement referred to above was ratified by Donald M. Ingram, as trustee, and in 1943, he signed a gas and condensate division order prepared by Champlin's predecessor. This order provided for one-tenth of eight-eights for the gas royalty. In 1965, the trust was terminated, and its royalty interests were distributed to the appellants, Donald C. Ingram and John C. Ingram. The individuals signed new division orders with Champlin which provided for a one-tenth royalty on the sale of residue gas and the products extracted from the gas. Payment was made in accordance with these division orders until 1974, when the appellants asserted they were entitled to a one-eighth royalty on the residue gas.

On July 15, 1974, the appellants filed suit against Champlin in a Texas state court seeking $775,584.00 for an accounting for royalty payment on residue gas based on too low a price, and for payment based on too low a price of the plant product. The suit also sought ownership of the gas in place under the lands covered by the lease agreement. Subsequently Champlin, as a stakeholder, brought this statutory interpleader action in the United States District Court for the Northern Dis-

trict of Oklahoma, seeking an interpretation of the royalty provision to decide the ownership of the two and one-half percent differential in the royalty payment. Champlin deposited $1,664.21 as the res which was the two and one-half percent difference computed on the value of residue gas produced during May and June 1974, and continued to make monthly deposits until trial.

An ex parte order was entered restraining all parties-defendant from the institution or prosecution of any proceedings. The appellants filed a motion to dismiss the complaint or dissolve the restraining order. The motions alleged that Champlin was not a mere stakeholder and that the Texas state court action had priority. The motions were denied, and this action proceeded with judgment for the Walker interests.

Although not raised below, the appellants raise on appeal the contention that the trial court lacked subject matter jurisdiction since Champlin failed to deposit the entire sum of money in controversy with the court. *See* Miller & Miller Auctioneers, Inc. v. G. W. Murphy Industries, Inc. 472 F. 2d 893 (10th Cir.); Gannon v. American Airlines, 251 F. 2d 476 (10th Cir.). Subject matter jurisdiction can of course be raised for the first time on appeal. Bledsoe v. Wirtz, 384 F. 2d 767 (10th Cir.) Appellants urge that the sum deposited is insufficient because it is not the amount in controversy. The record however shows that Champlin deposited all that it had in its possession at the time it was notified of the dispute and the cancellation of the division orders. *See* 28 U.S.C. †1335. Typically, Champlin did not seek to have decided the total amount of the obligation but sought to determine to whom the obligation was owing, the royalty owners or the working interest owners. The amount retained was small, but it was what accrued after the dispute was apparent.

The appellants' state court action sought damages for matters other than the two and one-half percent difference on the royalty on residue gas. These claims can

still be pursued since a permanent injunction was not issued. The statutory interpleader action only involved the two and one-half percent difference. The appellants admitted that Champlin does not have title to the real property as the res, nor did it have the differential on the residue gas that had been paid since 1957 to the working interest owners. An interpleader action is one in equity and is governed by equitable principles. Burchfield v. Bevans, 242 F. 2d 239 (10th Cir.); Holcomb v. Aetna Life Insurance Co., 228 F. 2d 75 (10th Cir.). Here it would be at least inequitable to require Champlin to deposit money which was paid to the working interest owners by the appellants' own actions. The dispute relates to the payments on future production.

Champlin thus deposited all of the disputed money that came into its possession after the controversy arose. Champlin thereby met the jurisdictional requirement. Murphy v. Travelers Insurance Co., 534 F. 2d 1155 (5th Cir.); Wright and Miller, Federal Practice and Procedure, †1716. In *Miller & Miller Auctioneers*, the auctioneers did not deposit all of the money in controversy since after the garnishee notice he distributed the money to the secured creditors and Miller & Miller and tendered the remainder into the court. The appellants also seek to raise for the first time on appeal the adequacy of the state remedy. This was not raised at the trial court level and will not be considered here. Neu v. Grant, 548 F. 2d 281 (10th Cir.).

The appellants' basic point is that the royalty provisions of the supplemental lease agreement were erroneously interpreted by the trial court. The pertinent language in section 8 of the lease is as follows:

> "(b) As of June 1, 1941, Lessor reserves and Lessee agrees to pay to the Lessor a one-tenth (1/10) part of the gross proceeds of all gas, condensate, distillate, gasoline or other liquid hydrocarbon substances produced or extracted from gas produced from all the leased lands. 'Gross

> proceeds' shall mean all the proceeds from the sale of gas or the products thereof from the leased lands, less taxes as herein provided to be paid by Lessor and less any commission required to be paid in connection with the sale of products.
>
> "(c) On gas, including gas, casinghead gas or other gaseous substances (condensate or distillate referred to in (b) above not included) produced from said land and sold off the said premises or in the manufacture of gasoline or other products thereof, Lessor reserves and Lessee agrees to pay one-eighth (1/8) part of the market value at the well of the gas so sold and (or) used off the premises, provided that on gas sold at the wells, the royalty shall be one-eighth (1/8) of the amount realized from such sale."

The trial judge concluded that the provisions were ambiguous as to the royalty payment on the residue gas, and looked to the conduct of the parties as evidenced by the division orders as to how the parties had interpreted the lease.

The appellants urge that section 8(b) above refers to liquid products from the processed gas, and since residue gas is a vapor, it should come under section 8(c) which is descriptive of gases. The grammatical construction of both sections is also asserted as supporting this conclusion. However, neither of these arguments demonstrates that the finding was clearly erroneous. The word "gas" for the payment of a royalty is found in both of these sections. Section 8(b) refers to gas, and the products of processed gas; and section 8(c) encompasses the sale of unprocessed gas at the well. After extracting the liquid products in the recycling process, the residue gas is reinjected into the ground to absorb more liquid products for the extraction process. When it becomes uneconomical to do so, the residue gas is then sold. It was not erroneous to find the royalty provisions to be ambiguous as to the applicable section for residue gas.

Under Texas law, when a contract for the sale of gas is found ambiguous, one looks to the conduct of the parties as to their interpretation, the subject matter of the contract, and the surrounding circumstances existing when the contract was executed to ascertain the intent of the parties. Lone Star Gas Co. v. X-Ray Gas Co., 164 S.W. 2d 504 (Tex.). The parties' construction is entitled to great weight and will be upheld if the construction is a reasonable one. Page v. Superior Stone Products, Inc., 412 S.W. 2d 660 (Tex. Civ. App.). For thirty years the parties had concluded under the division orders that the royalty on the residue gas was to be one-tenth of the proceeds of the sale. This was a reasonable construction. The appellants had knowledge of this construction as evidenced by the division orders. *See* Southland Royalty Co. v. Pan American Petroleum Corp., 378 S.W. 2d 50 (Tex.). Ambiguity under a Texas oil and gas lease should be resolved in favor of the lessor when there are two or more equally reasonable constructions. Zeppa v. Houston Oil Co. of Texas, 113 S.W. 2d 612 (Tex. Civ. App.). Here there are not two or more equally reasonable coiisrtuctions. Even in *Zeppa* the court looked to the construction placed on the oil and gas lease by the parties themselves.

At the time the contract was executed the economics of the gas recycling process had not been established. It was reasonable to conclude that section 8(b) was for processed gas and 8(c) was for unprocessed gas in the event the processing plant did not prove economical. The royalty for the processed gas could be expected to be less. At the time of contracting, the principal value in the gas was from the products. To have the gas processed free of charge as provided in the agreement resulted in a greater royalty for the one-tenth of the proceeds than one-eighth of the unprocessed gas.

A consideration of the issues of laches and stated accounts is not necessary to the determination of this appeal.

AFFIRMED.

APPENDIX B

JANUARY TERM—FEBRUARY 6, 1978

Before The Honorable Oliver Seth, Circuit Judge,
The Honorable William J. Holloway, Jr., Circuit Judge,
The Honorable Hatfield Chilson, District Judge

No. 76-1427

CHAMPLIN PETROLEUM COMPANY
a Delaware Corporation
Plaintiff-Appellee,

vs.

DONALD C. INGRAM AND JOHN C. IGRAM
Defendants-Appellants,

TRUST B CREATED BY THE TESTAMENT OF JAY P. WALKER
DECEASED, ET AL
Defendants-Appellees.

This matter comes on for consideration of the petition for rehearing filed by appellants.

Upon consideration whereof, the petition for rehearing is denied.

(A true copy)
Teste

HOWARD K. PHILLIPS
Clerk

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By: LINDA A. CARLSON
Deputy Clerk

APPENDIX C (1)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 74-C-320

CHAMPLIN PETROLEUM COMPANY,
a Delaware Corporation,
Plaintiff,

vs.

DONALD C. INGRAM, JOHN C. INGRAM ET AL

FORMAL CAPTION is omitted under Rule 36 (6).
Defendants.

JUDGMENT

This action was filed as a complaint for interpleader pursuant to Title 28, United States Code, †1335. Plaintiff, Champlin Petroleum Company, is a Delaware corporation organized and existing under the laws of the State of Delaware. The defendants, Donald C. Ingram; John C. Ingram; Donna Jo Cooper; Carol Jean Walker, a minor; and Judith Walker, guardian of her estate; are residents within the United States Judicial District for the Central District of California. The defendants, Trust B Created by the Last Will and Testament of Jay P. Walker, deceased, and the First National Bank and Trust Company of Tulsa, Ross T. Warner and Horace D. Ballaine, as Trustees thereof; Trust C Created by the Last Will and Testament of Jay P. Walker, deceased, and the First National Bank and Trust Company of Tulsa, Ross T. Warner and Horace D. Ballaine, as Trustees thereof; Charitable Trust Created by Paragraph 6 of Article I of the Last Will and Testament of Jay P. Walker, deceased, and the First National Bank and Trust Company of Tulsa, Ross T. Warner and Horace

D. Ballaine, as Trustees thereof; Martha Walker Sturtevant Trust and the First National Bank and Trust Company of Tulsa, as Trustees thereof; and Warner Investment Company, an Oklahoma corporation; are residents within the United States Judicial District for the Northern District of Oklahoma. The defendants, Nona C. Shudde Annuity Trust and Douglass D. Hearne, as Trustee thereof; are residents within the United States Judicial District for the Western District of Texas. The defendant, Martha Walker Sturtevant, is resident within the United States Judicial District for the Eastern District of Missouri. The defendants, the Estate of W. F. Knode, Deceased, and Margaret Knode, and Ralph Will, Executors thereof; are residents in Calgary, Alberta, Canada. The defendant, Guy O. Marchant, is resident within the United States Judicial District for the Western District of Oklahoma. The Plaintiff, Champlin Petroleum, has deposited in this Court an amount in excess of $500.00. The Court finds that the parties are citizens of the jurisdictions alleged as residency and that the citizenship of two or more of the adverse claimants is diverse as provided by Title 28, U.S.C. †1332. The jurisdiction requirements have been met and therefore the Court has jurisdiction to hear this matter. Under Title 28, U.S.C. †1397, venue is proper in this Court at least one or more of the claimants reside in the Northern District of Oklahoma.

Plaintiff, Champlin Petroleum Company, (hereinafter "Champlin"), is the operator but is not a working interest owner. Defendants, Donald C. Ingram and John C. Ingram, (hereinafter "Ingrams"), are royalty interest owners. All of the other defendants are gas working interest owners. The case was tried before the Court on February 9, 1976, with all the parties present or represented by counsel. All parties having rested, the case is ready for disposition on the merits. In considering the merits of this case, the Court has considered the entire record and is fully advised in the premises.

This case centers on a dispute concerning the correct

interpretation of two clauses of a Supplemental Lease and Agreement entered into on September 3, 1941, between Donald M. Ingram, Trustee (Trustee by instrument dated December 23, 1933) as lessor and the Process Oil Company as lessee. (Plaintiff's Exhibit #2). Donald M. Ingram, now deceased, was the father of the defendant Ingrams. The disputed clauses pertain to the payment of royalties and are part of paragraph eight of the Supplemental Lease and Agreement. Clause 8(b) provides in part:

> "(b) As of June 1, 1941, Lessor reserves and Lessee agrees to pay to the Lessor a one-tenth (1/10) part of the gross proceeds of all gas, condensate, distillate, gasoline or other liquid hydrocarbon substances produced or extracted from gas produced from all the leased lands. 'Gross proceeds' shall mean all the proceeds from the sale of gas or the products thereof from the leased lands, less taxes as herein provided to be paid by Lessor and less any commission required to be paid in connection with the sale of products. * * * * * "

Clause 8(c) provides in part:

> "(c) On gas, including gas, casinghead gas or other gaseous substances (condensate or distillate referred to in (b) above not included) produced from said land and sold off the said premises or in the manufacture of gasoline or other products thereof, Lessor reserves and Lessee agrees to pay one-eighth (1/8) part of the market value at the well of the gas so sold and (or) used off the premises, provided that on gas sold at the wells, the royalty shall be one-eighth (1/8) of the amount realized from such sale."

Under the Supplemental Lease and Agreement, Process Oil Company agreed, as lessee, to operate and maintain a re-cycling plant on the premises for the purposes of processing the gas and extracting liquids and products. On February 8, 1943, Process Oil Company, with the consent of Donald M. Ingram, Trustee, entered into a Gas Sales, Processing and Sales Agreement with the Chicago Corporation. (Plaintiff's Exhibit #4) The Chicago Corporation merged with Champlin Refining Co. on December 31, 1956. The surviving corporation was named Champlin Oil and Refining Co. and was later changed to Champlin Petroleum Company. Under the Gas Sales, Processing and Sales Agreement the Chicago Corporation (now the plaintiff herein) agreed among other things to pay the royalty owner his royalty from the gas working interest owner's share of the proceeds and thereafter pay the balance of the proceeds to the working interest owners. Under this agreement the plaintiff is responsible for disbursing the proceeds from the sale of products and liquid hydrocarbons extracted, separated and saved from gas (hereinafter "product proceeds") and the proceeds received from the sale of all residue gas (hereinafter "residue proceeds").

"Residue gas" as defined in the Supplemental Lease and Agreement means "gas which has been passed through Lessee's processing plant" (Plaintiff's Exhibit #2 page 7). "Residue gas" is that gas which remains after the mainstream has been run through a plant and liquids and other hydrocarbons have been extracted. After the mainstream of gas is processed through the recycling plant, the substance remaining is called "residue gas", and is also known as "dry gas" or "tailgate gas". (As used herein "residue gas", "dry gas" and "tailgate gas" are synonyms.) The "residue gas" is either returned to the formation and utilized as an absorbing agent for the purposes of aiding in the removal of crude material from the well or is sold in the market if the market price of "residue gas' is high or the formation has been exhausted of its crude material. It is the proper distribution of the revenue (residue proceeds) received from the sale of "residue gas" that is in dispute.

The defendant Ingrams claim that the royalty in-

terest owners are entitled to one-eight (1/8) of the residue proceeds in accordance with paragraph 8(c) of the Supplemental Oil and Gas Mining Lease. All of the remaining defendents (working interest owners) claim that the defendant royalty interest owners are entitled to only one-tenth (1/10) of the residue proceeds in accordance with paragraph 8(b) of the Supplemental Oil and Gas Mining Lease.

The defendant Ingrams argue that clause 8(c) applies to the distribution of residue proceeds by virtue of a straight-forward interpretation of the January 31, 1936, Oil and Gas Mining Lease between John Clarence Ingram and Donald M. Ingram, Trustees, lessor, and W. F. Knode, Trustee, lessee (Plaintiff's Exhibit #1), the Supplemental Lease and Agreement (Plaintiff's Exhibit #2), the Assignment of Lease from Process Oil Co. to The Chicago Corporation, (Plaintiff's Exhibit #3), The Gas Sales, Processing and Sales Agreement dated February 8, 1943, (Plaintiff's Exhibit #4), and various other Exhibits which relate to subsequent division orders and questions between various persons concerning the interpretation of clauses 8(b) and 8(c). The Ingrams point out that paragraph 3(a) and (b) of the Oil and Gas Mining Lease dated January 31, 1936, provides for a one-eighth (1/8) royalty for all oil and gas. The Ingrams argue that the Supplemental Lease and Agreement is weighted with the concern of the parties regarding the construction of a re-cycling plant and the removal of liquid hydrocarbons. Their contention is premised on the statement found on page one of the Supplemental Lease and Agreement which states in part:

> "WHEREAS, Lessee has drilled upon the above described real property certain gas wells (as hereinafter defined) and has operated or caused to be operated a re-cycling plant for the absorption and condensation of gasoline, distillate and other liquid hydrocarbons from gas produced from the leased lands; . . . . ",

and clause 8(d) which states in part:

> "(d) Lessor shall receive royalties as provided in sub-paragraphs (b) and (c) above, regardless of the percentages which may be paid to Lessee or its assigns by Pintas Gas Products Company, a corporation, or by any party extracting or processing for Lessee the products therein referred to. * * * "

In addition the Ingrams look to the portions of the Purchase Contract and Processing Agreement between The Chicago Corporation and Process Oil Company dated February 8, 1943, (Plaintiff's Exhibit #4), which pertain to the producing and processing of gas. The Ingrams contend that the agreement indicates that the primary concern of The Chicago Corporation and Process Oil Company was the processing of liquid hydrocarbons and the recycling of "residue" or "tailgate" gas back into the formations in order to extract more gas from the formations. Under this agreement The Chicago Corporation (now plaintiff) receives 55% from the sale of the residue or dry gas, and Process Oil Company (now working interests) receives 45% less 1/10th for the sale of liquids and 50% less 1/10th for the sale of residue gas. The main contention of the Ingrams is that "residue gas" was treated as a special category by the Supplemental Lease and Agreement and the agreements surrounding the extraction and processing of residue gas and therefore clause 8(c) was supplied to provide a one-eighth (1/8) distribution on residue proceeds. The argument follows that the special attention given to residue proceeds explains the purpose of having two separate clauses pertaining to royalties on gas. In taking the Ingrams' argument to its logical conclusion there would have been little need for clause 8(c) if the royalty on "residue proceeds" was to be paid at the same rate as product proceeds under clause 8(b).

The plaintiff and working interest owners argue that clause 8(b) of the Supplemental Lease and Agreement (Plaintiff's Exhibit #2) provides for the payment of

one-tenth (1/10) royalty on the proceeds of products and residue gas so long as the mainstream was processed by Process Oil Company (prior to 1943) or by The Chicago Corporation or the plaintiff (after 1943) under the Lease Agreement and not sold at the well. Plaintiff and working interest owners contend that clause 8(c) was made a part of the Supplemental Lease and Agreement of 1941 in order to provide royalty payments on gas which was sold to third parties before processing. Plaintiff and working interest owners contend that since Process Oil Company was required to process gas without cost to Donald M. Ingram, Trustee, under the Supplemental Lease and Agreement of 1941, clause 8(b) of that agreement provided for a royalty payment of one-tenth (1/10) of the proceeds of all the products as well as one-tenth (1/10) of the proceeds of the residue gas. Since the value of the processed gas is greater than the value of the raw gas at the well, an advantage accrued to the Trust over which Donald M. Ingram was Trustee in having the gas processed rather than sold at the well. Plaintiff and working interest owners conclude that, since the value of the processed gas is greater than the value of gas at well and since the trust was not burdened with the cost of processing, the Trustee was paid one-tenth (1/10) royalty on the products and residue. However, in the event that the gas was sold at the well, the value was less and no processing cost was levied resulting in a royalty payment of one-eighth (1/8). This interpretation of the disputed provisions of the Supplemental Lease and Agreement shows the need for two separate clauses in regard to the payment of royalties. Plaintiff and working interest owners conclude that residue proceeds must be payable under clause 8(b) because no residue gas is apparent where the gas is not processed but rather sold at the well under the provisions of clause 8(c).

The term "residue gas" or its synonyms are not found in either 8(b) or 8(c) of the Supplemental Lease and Agreement. As applied to "residue gas" clauses 8(b) and 8(c) are ambiguous and do not by their terms

clearly reflect the intent of the parties in regard to the payment of royalties on "residue gas." Where a contract is susceptible to two constructions the Court will adopt a construction which is reasonable and probable. See *National Sur. Corp.* v. *Western Fire and Indem. Co.*, 318 F. 2d 379 (5th Cir. 1963). Where the contract is not clear or where the meaning is doubtful the Court may consider the acts of the parties and interpret the disputed provisions in accordance with the construction placed upon them by the parties. See *Esso Intern., Inc.*, v. *S.S. Captain John*, 443 F. 2d 1144 (5th Cir. 1971); *Fowler* v. *Penn. Tire Co.*, 326 F. 2d 526 (5th Cir. 1964); *Skaggs* v. *Heard*, 172 F. Supp. 813 (S.D. Tex. 1959).

The exhibits submitted and made a part of the record clearly show that The Chicago Corporation and its successor (plaintiff herein) paid and that Donald M. Ingram, Trustee and his successor (Ingrams herein) accepted the royalty payment on gas in the amount of one-tenth (1/10) of 8/8ths from 1943 until 1974 when the Ingrams initiated litigation in the 94th District Court of Nueces County, Texas. In a letter from Process Oil Company to Donald M. Ingram, Trustee, dated April 8, 1943, the royalty payment is stated to be one-tenth (1/10). (Plaintiff's Exhibit #12). In 1943, Donald M. Ingram executed a Gas and Condensate Division Order wherein the division of interest was stated to be one-tenth (1/10) or 8/8ths of all gas including natural gasoline, condensate, and other products that may be condensed, absorbed or separated out of or from gas. (Plantiff's Exhibit #7D). From 1944 until 1965 Donald M. Ingram, Trustee, received statements from The Chicago Corporation and Champlin which indicate that the royalty payment on gas and products was one-tenth (1/10). (Plaintiff's Exhibit #8). In 1965 the Ingrams executed a Gas and Condensate Division Order which provides for a 5% division of interest for Donald C. Ingram and a 5% division of interest for John C. Ingram on all gas, including natural gasoline, condensate, and other products that may be condensed, absorbed or separated out of or from gas. (Plaintiff's Exhibit #18).

At trial the Ingrams testified that they signed the division orders because their father, Donald M. Ingram, had advised them that it was alright to sign the orders and that they knew nothing about the distribution of royalties. From 1965 until 1974 the Ingrams received royalty statements which indicate the royalty payment to be one-tenth (1/10) on product and residue proceeds. (Plaintiff's Exhibit #11). For a period of thirty (30) years the royalty payment has been a one-tenth (1/10) part of the gross proceeds of all gas including "residue gas" produced or extracted from gas. "Gross Proceeds" is defined in clause 8(b) to include "all the proceeds from the sale of gas or the products thereof from the leased lands" less taxes and commissions as stated. The construction placed on clause 8(b) of the Supplemental Lease and Agreement by the parties to the agreement was that residue proceeds were to be paid at the rate of one-tenth (1/10) of 8/8ths and that clause 8(b) governed such payment of residue proceeds. This is convincing support for a finding by the Court that the parties intended that clause 8(b) of the Supplemental Lease and Agreement be applied in determining the proper distribution of proceeds from "residue" or "dry gas."

A reasonable construction of the ambiguous terms of the Supplemental Lease and Agreement leads to the conclusion that the parties intended that clause 8(b) apply in the event that gas and products are produced or extracted by the plaintiff from gas produced (removed) from the leased premises. Clause 8(c) does not speak in terms of liquid hydrocarbons substances "produced or extracted from gas" produced from all the leased lands but rather refers to gas "produced" (removed from said land and sold off the premises. Therefore clause 8(b) makes reference to production (processing) after the gas is produced (removed) from the leased premises. A resonable interpretation of the Supplemental Lease and Agreement of 1941 leads to the conclusion that the parties to this agreement were concerned about the operation of a re-cycling plant as a

means of processing gas and gas products. The Oil and Gas Mining Lease of 1936 provided for payment of one-eighth on both oil and gas. (Plaintiff's Exhibit #1). The 1936 agreement did not include terms concerning the operation of a re-cycling plant. In providing for the distribution of royalties, it is logical that the parties included clause 8(b) in the 1941 agreement to cover payment for processed gas and residue and that clause 8(c) was intended to govern when gas was not processed by the plaintiff. With some variation clause 8(c) of the Supplemental Lease and Agreement is very similar to clause 3(b) of the Oil and Gas Mining Lease of 1936. In 1941 the parties provided for royalties on processed gas and products by drafting clause 8(b). It is reasonable to assume that they would have specifically exempted "residue gas" from the one-tenth (1/10) royalty if they had desired to provide a royalty of one-eighth (1/8) on residue gas. As the royalty interest owners have suggested, the 1941 agreement addresses itself to the re-cycling operation. Where the parties have emphasized royalties on processed gas, it is unlikely that they would have overlooked a specific reference to residue gas if they had desired to provide a one-eighth (1/8) royalty.

For the reasons stated herein it is the finding and conclusion of the Court that clause 8(b) of the Supplemental Lease and Agreement of 1941 governs the payment of royalties on "residue gas" and that the payments heretofore deposited in this Court in accordance with the complaint for interpleader are the property of the working interest owners as described herein. Having so interpreted the disputed clauses of the 1941 agreement, the Court has no need and therefore declines to examine the theories of account stated, estoppel, laches and the statute of limitations in regard to the claim that Champlin acted in a fiduciary capacity.

The plaintiff seeks a permanent injunction forbidding the defendants from instituting or prosecuting any proceeding in any State or United States court affecting

the adversely claimed residue proceeds. "In an interpleader action, however, in personam jurisdiction extends only to the fund deposited with the court." *Knoll* v. *Socony Mobil Oil Co.*, 359 F. 2d 425, 429 (10 Cir. 1966). The jurisdiction of this Court over these parties does not encompass a jurisdictional base for issuing a permanent injunction and such request is denied.

The plaintiff has requested relief in the form of attorney's fees and costs. Attorney's fees and costs may be awarded in interpleader actions. *Travelers Indem. Co.* v. *Israel*, 354 F. 2d 48 (2nd Cir. 1965); *Equitable Life Assurance Soc. of U.S.* v. *Rose*, 248 F. Supp. 937 (D. Colo. 1965); *Paul Reverse Life Ins. Co.* v. *Riddle*, 222 F. Supp. 867 (E. D. Tenn. 1963). The parties have not briefed the law in regard to whether attorney's fees and costs should be awarded in this case. No testimony has been presented as to the proper amount to be awarded in this case. No testimony has been presented as to the proper amount to be awarded if any. Therefore, the Court reserves ruling on this question and will be made within ten (10) days of the date of this Order.

It is so Ordered this 16th day of March, 1976.

H. DALE COOK
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 74-C-320-C

CHAMPLIN PETROLEUM COMPANY,
a Delaware Corporation,
Plaintiff,

vs.

DONALD C. INGRAM AND JOHN C. INGRAM, ET AL

FORMAL CAPTION is omitted under RULE 36 (6)
Defendants.

JUDGMENT

On the 16th day of March, 1976, the Court issued a Judgment in the above entitled cause wherein the Court reserved ruling on the plaintiff's prayer for attorney's fees. In said Judgment, the parties were granted ten (10) days from March 16, 1976, to submit a request for attorney's fees and brief the law on this issue.

On March 29, 1976, the Court received a letter from Mr. Frederic Dorwart, Counsel for the plaintiff wherein Mr. Dorwart states that no application for an award of attorney's fee will be filed.

The ten days have expired with no application for attorney's fee being submitted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED in accordance with the Judgment filed on March 16, 1976, that Judgment be entered in favor of the plaintiff and the defendant working interest owners and against the defendant royalty interest owners.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no attorney's fee be awarded in this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the request of the plaintiff for a permanent injunction is denied.

It is so Ordered this 2nd day of April, 1976.

H. DALE COOK
United States District Judge

APPENDIX C (2)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 74-C-320

CHAMPLIN PETROLEUM COMPANY,
a Delaware Corporation
Plaintiff,

v.

DONALD C. INGRAM AND JOHN C. INGRAM ET AL
FORMAL CAPTION is omitted under Rule 36(6)
Defendants.

ORDER RESTRAINING INSTITUTION OR PROSECUTION OF PROCEEDINGS

TO: DONALD C. INGRAM;
JOHN C. INGRAM
TRUST B CREATED BY THE LAST WILL AND TESTAMENT OF PAY P. WALKER, DECEASED, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, ROSS T. WARNER and HORACE D. BALLAINE, as Trustees thereof;
TRUST C CREATED BY THE LAST WILL AND TESTAMENT OF JAY P. WALKER, DECEASED, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, ROSS T. WARNER and HORACE D. BALLAINE, as Trustees thereof;
CHARITABLE TRUST CREATED BY PARAGRAPH 6 OF ARTICLE I OF THE LAST WILL AND TESTAMENT OF JAY P. WALKER, DECEASED, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, ROSS T. WARNER and HORACE D. BALLAINE, as Trustee thereof;
DONNA JO COOPER;

MARTHA WALKER STURTEVANT TRUST and
THE FIRST NATIONAL BANK AND TRUST
COMPANY OF TULSA, as Trustee thereof;
GUY O. MARCHANT;
CAROL JEAN WALKER, a minor, and JUDITH
WALKER, Guardian of her Estate;
MARTHA WALKER STURTEVANT;
WARNER INVESTMENT COMPANY, an Oklahoma corporation;
NONA C. SHUDDE ANNUITY TRUST and
DOUGLASS D. HEARNE, as Trustee thereof; and
THE ESTATE OF W. F. KNODE, DECEASED,
and MARGARET KNODE and RALPH WILL,
Executors thereof.

Upon the summons and verified complaint filed herein, and upon oral motion of Frederic Horwart, attorney for plaintiff, it is:

ORDERED that the defendants herein, listed above, and all persons acting by or on behalf of any of them, be and they hereby are, restrained from instituting or prosecuting any proceeding in any State or Federal court affecting the adversely claimed Residue Proceeds, or the determination or payment of proceeds under the Oil and Gas Mining Lease, the Supplemental Oil and Gas Mining Lease, or the Gas Sales, Processing & Sales Amendment, which are involved in this interpleader action, including *Cause No. 74-2242-C, 94th District Court of Nueces County, Texas, D. C. Ingram and J. C. Ingram v. Champlin Petroleum Company;*

FURTHER ORDERED that said defendants show cause before this Court at a hearing to be held at 10:00 o'clock A.M. on 9th September 1974, in the United States District Court Room, Federal Court Building, Tulsa, Oklahoma, or as soon thereafter as counsel can be heard, why a preliminary injuction pendente lite should not be issued against the said defendants restraining said defendants, and all persons acting by or on behalf of them, from instituting or prosecuting any proceeding

in any State or Federal court affecting the adversely claimed Residue Proceeds, or the determination or payment of proceeds under the Oil and Gas Mining Lease, the Supplemental Oil and Gas Mining Lease, or the Gas Sales, Processing & Sales Amendment, which are involved in this interpleader action, including *Cause No. 74-2242-C, 94th District Court of Nueces County, Texas, D. C. Ingram and J. C. Ingram v. Champlin Petroleum Company.*

FURTHER ORDERED that service of this order may be made by mailing or delivering a true copy hereof, together with summons and complaint to said defendants; and

FURTHER ORDERED that said defendants shall serve any answering affidavits or briefs on the attorney for the plaintiff on or before 26 August, 1974.

DATED: August 9th, 1974.

LUTHER BOHANON
United States District Judge

APPENDIX C (3)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 74-C-320

CHAMPLIN PETROLEUM COMPANY,
a Delaware Corporation
Plaintiff,

v.

DONALD C. INGRAM AND JOHN C. INGRAM ET AL
Defendants.

ORDER OVERRULING THE MOTION TO DISMISS THE COMPLAINT AND OVERRULING THE MOTION TO DISSOLVE THE RESTRAINING ORDER

This action was brought on a Complaint for Interpleader by the Plaintiff, Champlin Petroleum Company. The Complaint seeks an interpretation of two apparently conflicting provisions of a Supplemental Oil and Gas Mining Lease which is dated September 3, 1941, and the Gas Sales, Processing & Sales Amendment which is dated February 8, 1943. The Plaintiff is the operator of the oil and gas leasehold estates arising under the said leases and agreements. It is responsible for disbursing the proceeds from the sale of products and liquid hydrocarbons extracted, separated and saved from gas (hereinafter "Product Proceeds"), and the proceeds received from the sale of all residue gas (hereinafter "Residue Proceeds). The Defendants Donald C. Ingram and John C. Ingram (hereinafter "Ingrams"), are the royalty interest owners. They claim that they are entitled to one-eighth of the Residue Proceeds. The Defendant working-interest owners claim that the Ingrams are entitled to only one-tenth of the Residue Proceeds.

In its Complaint the Plaintiff requested that the Court issue a restraining order preventing the Defendants from instituting or prosecuting any proceeding in any State Court or United States Court which would affect the adversely-claimed Residue Proceeds or the payment thereof until such time as a hearing on a preliminary injunction pendente lite was held. The Court issued an Order Restraining Institution or Prosecution of Proceedings on August 9, 1974. Prior to the issuance of the Restraining Order and the Plaintiff's Complaint for Interpleader filed on August 8, 1974, the Ingrams filed an action styled *D. C. Ingram and J. C. Ingram* v. *Champlin Petroleum Company*, No. 74-2242-C, 94th District Court of Nueces County, Texas, on July 15, 1974. In the Texas action, the Ingrams alleged that the Champlin Petroleum Company had fraudulently induced D. C. Ingram and J. C. Ingram to sign a Gas and Condensate Division Order on or about August 30, 1965. The Ingrams further alleged in their petition that because of said Division Order they receive only 10 percent of the residue proceeds and are paid at a value other than the value prescribed in the Oil & Gas Mining Supplemental Agreement of 1941 and the Gas Sales, Processing & Recycling Amendment of 1943.

Defendant Ingrams filed a Motion to Dismiss the Complaint and/or Dissolve the Restraining Order in this Court on September 10, 1974. The Ingrams allege in their Motion that the Texas litigation is a dispute between the Ingrams and Champlin Petroleum Company and that it is not a dispute between the other Defendants. The Plaintiff claims that the Texas court has been asked to determine the interest of all the Defendants in the Product and Residue Proceeds and therefore the state court decision will affect the property involved in the Complaint for Interpleader. The Ingrams also argue that since Champlin is a mere stakeholder in this action the Ingrams are denied a right to counterclaim for the wrongs alleged in the Texas litigation. The Motion asks the Court to either dismiss the action in this Court or dissolve the restraining order to enable the Ingrams to

proceed with their claim against the Plaintiff. For the reasons stated herein, the Court finds that the Defendant Ingrams' Motions to Dismiss and/or Dissolve must be overruled.

The Ingrams have not attacked the allegations of the Complaint for Interpleader but have charged the Plaintiff with filing the Complaint in this Court as an effort to escape any liability which may be found in the Texas litigation. Although the Ingrams seek a dismissal, the crux of their Motions challenges the propriety of restraining the Ingrams from proceeding in the Texas litigation. The thrust of the Ingrams' argument in seeking the dissolution of the restraining order centers on the case of *Knoll* v. *Socony Mobil Oil Co.*, 369 F. 2d 425 (10th Cir. 1966). In *Knoll* the appellee, Mobil Oil Company, had interpleaded adverse and conflicting claims to royalty interests in an effort to avoid vexatious litigation and multiple liability. Monies were deposited into the Court to be distributed upon determination of rightful ownership. The appellants attacked the jurisdiction of the Court on the basis of pending litigation in another court. In answering the appellants' attack on jurisdiction, the *Knoll* Court found that the pending litigation was strong evidence that adverse claims were being asserted and, "(T)he fact that Mobil was defending litigation at the time the present action was brought does not preclude the court's jurisdiction." The court found that the Federal Interpleader Statute (28 U.S.C. †1335) was designed to protect a party from multiple liability and to apply in situation such as was present in *Knoll*.

In the instant case, the Plaintiff has alleged facts which indicate that a situation similar to that presented in *Knoll* exists in this case and that the interpleader statute was employed to determine the rightful owner of the disputed property without subjecting the Plaintiff to multiple litigation and liability.

In answering the appellants' contention that interpleader was brought by Mobil to escape its independent liability, the *Knoll* Court found that there was,

> "(N)othing in the record to suggest that Mobil's interest in the fund deposited was or is anything more than a desire to obtain an adjudication as to rightful ownership of the fund." *Knoll* at 428.

The facts presented in the record before the Court indicate that the Plaintiff has brought its Complaint to this Court for no other reason than for a determination of the rightful ownership of the fund which it has deposited into the Court. There is nothing on the face of the Complaint which discloses any lack of good faith on the part of the Plaintiff. *Holcomb* v. *Aetna Life Ins. Co.*, 228 F. 2d 75 (10th Cir. 1955). While the restraining order has the effect of postponing the Texas litigation, it does not prevent or allow the Plaintiff to escape liability in the Texas action. Finally, the *Knoll* Court found that even though Mobil may be independently liable to some of the Defendants, the court was not without jurisdiction in the interpleader suit.

> "The previous decisions of this Court preclude a holding that the existence of a prior independent liability defeats jurisdiction in an interpleader suit." *Knoll* at 429.

The *Knoll* decision supports the continuation of the Restraining Order until such time as the Court determines the question of ownership of the funds deposited with the Court.

The facts as presented in the record are strikingly similar to those in *Holcomb* v. *Aetna Life Ins. Co.*, 228 F. 2d 75 (10th Cir. 1955), wherein the appellants sought an order vacating a restraining order staying pending state court proceedings. The *Holcomb* Court found that,

> ". . . 28 U.S.C.A. †2361 provides that in any civil action of interpleader or in the nature of interpleader under section 1335 of the title, the district court may enter its order restraining the

> defendants from prosecuting any proceeding in any state court affecting the property, instrument, or obligation involved in the interpleader action until the further order of the court."
> *Holcomb* at 80.

The ownership of the fund deposited with this Court must be determined by interpreting the Oil & Gas Mining Supplemental Agreement and the Gas Sales, Processing & Recycling Amendment. These agreements are the subject of the Texas litigation. An interpretation by the Texas Court would affect the property or obligation of the Plaintiff in regard to the funds deposited with this Court. The Restraining Order properly avoids the possibility of multiple liability where the two courts may disagree on the interpretation of the agreements. In their brief the Ingrams argue that the *Knoll* Court found that a permanent injunction issued by the trial court was void and therefore the Restraining Order issued by this Court should also be void. The Ingrams have not been permanently enjoined from prosecuting their claim that the said Division Order was fraudulently obtained. While the *Knoll* Court found that the trial court did not have jurisdiction to permanently enjoin the appellants from asserting title in the property which was the subject of that litigation, no such permanent injunction had been issued from this Court. The Court is not inclined to prospectively determine the propriety of a similar permanent injunction.

The Ingrams allege that they are prevented from filing a counterclaim in this action because of the nature of interpleader as stated in the *Knoll* decision. No such counterclaim has been filed with the Court. In the event that a counterclaim is filed the parties may present arguments to the Court at the appropriate time.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Defendant Ingrams' Motion to Dismiss the Complaint and Defendant Ingrams' Motion to Dissolve the Restraining Order are overruled for the reason that

the Plaintiffs' action was properly brought to this Court and the Plaintiff is properly protected from vexatious litigation and multiple liability in conformity with the purpose of the interpleader statute 28 U.S.C. †1335.

It is so Ordered this 13th day of March, 1975.

H. DALE COOK
United States District Judge

APPENDIX D

1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action or interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title (28 USCS † 1332), are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical but are adverse to and independent of one another.

(June 25, 1948, c. 646, † 1, 62 Stat. 931.)

APPENDIX E

Rule 22. Interpleader

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., †† 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

APPENDIX F

TEXAS REVISED CIVIL STATUTES (in effect at all pertinent times—and NOW) "includes any area which is underlaid, or which from geological or other scientific data or experiments or from drilling operations or other evidence appears to be underlaid by a common pool or accumulation of oil and/or gas;

(d) The term 'gas well' is any well (a) which produces natural gas not associated or blended with crude petroleum oil at the time or production, or (b) which produces more than one hundred thousand (100,000) cubic feet of natural gas to each barrel of crude petroleum oil from the same producing horizon, or (c) which produces natural gas from a formation or producing horizon productive of gas only encountered in a well bore through which crude petroleum oil also is produced through the inside of another string of casing.

(e) The term 'oil well' is any well which produces one (1) barrel or more of crude petroleum oil to each one hundred thousand (100,000) cubic feet of natural gas.

(f) 'Dry Gas' is any natural gas produced from a stratum that does not produce crude petroleum oil.

(g) The term 'sour gas' shall mean any natural gas containing more than one and one-half (1½) grains of hydrogen sulphide per one hundred (100) cubic feet or more than thirty (30) grains of total sulphur per one hundred (100) cubic feet, or gas which in its natural state is found by the Commission to be unfit for use in generating light or fuel for domestic purposes.

(h) The term 'sweet gas' shall mean all natural gas except "sour gas" and "casinghead gas."

(i) The term 'casinghead gas' shall mean any gas and/or vapor indigenous to an oil stratum and produced from such stratum with oil. * * * *".

APPENDIX G.

(Copied from Vol. 1, Tr. 84-5):

No. 74-2242-C

D. C. INGRAM AND J. C. INGRAM

VS.

CHAMPLIN PETROLEUM COMPANY

IN THE 94TH DISTRICT COURT
NUECES COUNTY, TEXAS

DEFENDANT'S ORIGINAL ANSWER

Now comes Champlin Petroleum Company by and through its undersigned attorneys and denies generally each and every allegation contained in plaintiffs' original petition and demands strict proof thereof.

WHEREFORE, having fully answered, this defendant prays that plaintiffs take nothing as against it and that it be awarded its costs herein expended.

ROBERT W. COX
Champlin Petroleum Company
P. O. Box 9365
Fort Worth, Texas 76107
817/738-7391

CECIL E. MUNN
Cantey, Hanger, Gooch, Cravens
& Munn
1800 First National Building
Fort Worth, Texas 76102
817/332-7561

By: CECIL E. MUNN

Attorneys for Defendant

CERTIFICATE OF SERVICE

A copy of the foregoing document was served upon the plaintiffs by mailing to their attorney of record on this 8th day of August, 1974.

CECIL E. MUNN

APPENDIX H

CERTIFICATE OF SERVICE BY MAILING

I HEREBY CERTIFY that I have mailed true and correct picture copies of the foregoing PETITION OF INGRAMS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT by U.S. Mail, postage prepaid, to the following:

Frederick Dorwart
J. Michael Medina
Suite 700, Holarud Bldg.
Ten East Third Street
Tulsa, Okla. 74103
(Counsel for Champlin)

Horace D. Bellaine
Conners, Winters, Ballaine
Barry & McGoven
2400 First National Tower
Tulsa, Okla. 74103
(Counsel for all other Appellees)

and to:

David L. Motloch
Champlin Petroleum Co.
P. O. Box 9365
Fort Worth, Tx 76107
(For Champlin)

this the 24th day of April, 1978.

E B Ingrams

Supreme Court, U. S.
FILED
MAY 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1529

DONALD C. INGRAM and JOHN C. INGRAM
Petitioners,

v.

CHAMPLIN PETROLEUM COMPANY AND TRUSTS CREATED BY THE LAST WILL AND TESTAMENT OF JAY P. WALKER, DECEASED, ET AL.
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For the Tenth Circuit

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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CHAMPLIN PETROLEUM COMPANY

JAMES R. RYAN
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Tulsa, Oklahoma 74103
Attorney For All Other Respondents

DI CESARE - Printing — 331-4101 — Washington, D.C. 20006

RESPONDENTS

CHAMPLIN PETROLEUM COMPANY, and TRUST B CREATED BY THE LAST WILL AND TESTAMENT OF JAY P. WALKER, DECEASED, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, ROSS T. WARNER AND HORACE D. BALLAINE, as Trustees thereof; TRUST C CREATED BY THE LAST WILL AND TESTAMENT OF JAY P. WALKER, DECEASED and THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, ROSS T. WARNER AND HORACE D. BALLAINE, as Trustees thereof; CHARITABLE TRUST CREATED BY PARA GRAPH 6 OF ARTICLE I OF THE LAST WILL AND TESTAMENT OF JAY P. WALKER, DECEASED, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, ROSS T. WARNER AND HORACE D. BALLAINE, as Trustees thereof; DONNA JO COOPER; MARTHA WALKER STURTEVANT TRUST and THE FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, as Trustee thereof; GUY O. MARCHANT; CAROL JEAN WALKER, a minor, and JUDITH WALKER, Guardian of her Estate; MARTHA WALKER STURTEVANT; WARNER INVESTMENT COMPANY, an Oklahoma Corporation; NONA C. SHUDDE ANNUITY TRUST AND DOUGLASS D. HEARNE, as Trustee thereof; and THE ESTATE OF W. F. KNODE, DECEASED, and MARGARET KNODE AND RALPH WILL, Executors thereof

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1529

DONALD C. INGRAM and JOHN C. INGRAM
Petitioners,

v.

CHAMPLIN PETROLEUM COMPANY AND TRUSTS CREATED BY THE LAST WILL AND TESTAMENT OF JAY P. WALKER, DECEASED, ET AL.,
Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For the Tenth Circuit

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

Only questions 1, 8 and 9 of petitioners' listed "Questions Presented" are properly before this Court. The remainder of petitioners' questions either contain unwarranted assumptions upon which the questions are based or are purely argumentative.

STATEMENT OF FACTS

The facts of the case are stated fully and correctly in the decisions of the District Court (Petitioners' Appendix C (1) and (3)) and the Court of Appeals (Petitioners' Appendix A). The petitioners' statement of facts is incomplete and incorrect.

ARGUMENT

I. INTRODUCTION

Contrary to the conclusory allegations of the petition, this case does not merit Supreme Court review. Paraphrasing the words of Rule 19 of the Supreme Court Rules, this case:

> (1) does not involve a decision in conflict with decisions of other courts of appeal;
>
> (2) does not decide an important state question in a way in conflict with applicable state law;
>
> (3) does not decide an important question of federal law which has not been, but should be, settled by this Court;
>
> (4) does not decide a federal question in a way in conflict with applicable decisions of this Court; and
>
> (5) does not involve such a departure from the accepted and usual course of judicial proceedings to call for an exercise of this Court's powers of supervision.

What this case does involve is a question of state contract law, competently decided by the District Court and the Court of Appeals for the Tenth Circuit. The case involves a unique oil and gas instrument with two royalty provisions governing gas. The

issues involved are narrow ones, involving settled principles of contract interpretation. It is highly unlikely that any other instrument like the one in this case exists. No significant precedent could be established by this Court in granting certiorari and resolving the issues presented therein.

Each of petitioners' reasons for granting certiorari is hereafter discussed, in the order presented in the petition for a writ of certiorari.

II. THE WRIT SHOULD NOT BE GRANTED

A. This Case Does Not Present Significant Questions Concerning the Scope of 28 U.S.C. §1335 and Rule 22 of the Federal Rules of Civil Procedure.

Of course, §1335 is involved because §1335 was the basis for the District Court's jurisdiction. Rule 22 is not involved, nor was it ever cited as authority by the respondents in their briefs to the Tenth Circuit or by the Tenth Circuit in its opinion. Finally, the petitioners merely claim that the procedural decisions of the Supreme Court and of the lower courts "spotlight the confusion and consternation on the part of lesser federal courts in deciding procedural questions in cases concerning . . . 28 U.S.C. §1335." (Petition, p. 8). The petitioners chose not to enlighten either the Court or the respondents as to what the confusion and consternation is concerning §1335. The practice and procedure under §1335 is perfectly clear, well established, and followed consistently througout the circuits. Therefore, there is no need for this Court to "clarify the meaning and effect of these two provisions governing federal courts." (Petition, p. 8).

B. There Is No Conflict Between the Tenth Circuit Decision Rendered Below and Decisions from the Second, Fourth, Fifth, Sixth, Seventh, Eight and Ninth Circuits.

The cases cited by the petitioners as contrary to the holding of the Tenth Circuit are irrelevant. Except for the cases of *Hickock v. Gulf Oil Corp.*, 265 F.2d 798 (6th Cir. 1959) and *Humble Oil and Refining Co. v. Copeland*, 398 F.2d 364 (4th Cir. 1968), all the cited cases were declaratory judgment cases, and not statutory interpleader cases. The statutory interpleader statute (28 U.S.C. §2361) itself permits restraining orders against pending state court proceedings. (See Subpart C, *infra*, at p. xxvii). Furthermore, in those declaratory judgment cases, the appellate court merely affirmed the exercise of discretion of the trial court in staying the federal declaratory judgment action until resolution of the pending state court proceeding. Staying the federal action was a matter of the discretion of the trial judge, in confirmation of the general rule that the power of a federal court to stay its proceedings while a similar state action is pending (when not involving title to real property) is a matter of comity, not jurisdiction. *See Annot.*, 5 A.L.R. Fed. 10 at §§4 and 5. Finally, in the cited declaratory judgment cases, the federal actions were dismissed because either all the parties in the federal action were involved in the pending state action, (*Aetna Casualty & Surety Co. v. Quarles*, 92 F.2d 321 (4th Cir. 1937); *American Auto Ins. Co. v. Freundt*, 103 F.2d 613 (7th Cir. 1939); *Shell Oil Co. v. Frusetta*, 290 F.2d 689 (9th Cir. 1961)), because realignment of the parties according to interest destroyed diversity of citizenship, (*State Farm Mutual Ins. Co. v. Hugee*, 115 F.2d 298 (4th Cir. 1940); *Thompson v. Moore*, 109 F.2d 372 (8th Cir. 1940)), because no justiciable controversy was presented, (*TRW Inc. v. Ellipse Corp.*, 495 F.2d 314 (7th Cir. 1974)), or because the state action did not relitigate a prior federal decision (*Southern California Petroleum Corp. v. Harper*, 273 F.2d 715 (5th Cir. 1960)).

Humble Oil Co., supra, and *Hickok, supra*, are statutory interpleader cases. Neither case supports the petitioners.

(1) Both cases involved interests in land and construction of wills purporting to devise realty. In the present lawsuit, neither the Texas state action nor the federal interpleader action was couched in terms of real property. The Champlin interpleader complaint involved monies received for the sale of gas produced and a dispute as to whom was entitled thereto. No real property was involved, and no title to real property was sought to be determined in the Oklahoma interpleader action. The Tenth Circuit specifically so held. (Petitioners' Appendix, 4a-5a).

Indeed, both the *Hickock* Court and the *Humble* Court indicated that faced with the same situation confronting the Tenth Circuit below, they would both have ruled the same way. In *Hickock*, the Court stated that in an interpleader action, a federal court has "unquestioned jurisdiction" over the proceeds from the sale of an interest in extraterritorial land and has power "to adjudicate title to the fund" under applicable law. 265 F.2d at 801. In *Humble, supra*, the Court stated that where the parties' rights to land were based on contract, such interests could be determined in an in personam action by a federal court sitting in another state in an interpleader action. 398 F.2d at 367. In cases not involving real property, the accepted rule is that a federal court's power to stay its proceedings while similar state action is pending is a matter of comity, not jurisdiction, and within the sound discretion of the trial court. *Annot.*, 5 A.L.R. Fed. 10 at §§4-5.

(2) In both the *Hickock* and *Humble* cases, all the relevant parties were represented in the state court proceedings. Such is not the case in the present litigation.

The working interest owners were not parties to the Texas state action nor did petitioners in the lower courts ever attempt to specifically demonstrate how all the working interest owners could be brought into the state court proceedings. The fact that certain parties to an action in a federal district court were not before a state court in which a similar action was pending has been generally held to be a sufficient reason for denying a stay. *Annot.*, 5 A.L.R. Fed. at §10(B). Indeed, one of the primary purposes for §1335 was to provide a forum for cases where a state court could not obtain jurisdiction over all the parties. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cavicchia*, 311 F. Supp. 149 (S.D.N.Y. 1970); *M.F.A. Mut. Ins. Co. v. Lusby*, 295 F.Supp. 660 (W.D.Va. 1969). In addition, this action is testimony to the usefulness of the statutory interpleader device, which permits nationwide service of process. The interpleader statute permitted the bringing of all the parties together, allowed deposit into the court of the fund, and a complete resolution of the issue. There has been no showing that the Texas state court action could do the same.

(3) The issue of the adequacy of the state remedy was not raised in the District Court and was first raised on appeal to the Tenth Circuit. Therefore, it may not be raised in this Court. *cf., Brown, Bonnell & Co. v. Lake Superior Iron Co.*, 134 U.S. 530 (1890); *Reynes v. Dumont*, 130 U.S. 354 (1889) (the existence of an adequate legal remedy in an equity case may not be first raised on appeal).

(4) Denial of a stay is proper where federal procedural advantages would be lost by the granting of the stay. *See, e.g., Levy v. Alexander*, 170 F.Supp. 439 (E.D.N.Y. 1959); *Weisfeld v. Spartans Industries, Inc.*, 58 F.R.D. 570 (S.D.N.Y. 1972). The procedural advantage of which petitioners seek to deprive respondents is a complete resolution of the issue, with all interested parties brought into the action.

The petitioners then attempt to artificially create a conflict with cases purportedly holding that a district court lacks jurisdiction when a party does not deposit into court all disputed funds in its possession at the time of the institution of the suit. Two things must be stated:

(1) Respondent Champlin did not admit it had failed to deposit all disputed funds in its possession; it merely offered to, out of its own pocket, deposit additional funds should the District Court or the Tenth Circuit deem it necessary, and

(2) the cases cited by the petitioners merely stand for the unquestioned proposition that one must deposit all the disputed funds in one's possession to institute statutory interpleader. Since all the disputed funds were deposited by Champlin into the District Court, as found by the Tenth Circuit (Petitioners' Appendix, pp. 4a–5a), statutory interpleader was proper, and the cited cases have no application.

There is no conflict between the Tenth Circuit's decision and decisions cited by petitioners in reason 2 of their petition.

C. The Tenth Circuit Decision Is Fully Consistent With Applicable Decisions of This Court.

Petitioners contend that the Tenth Circuit's decision is contrary to this Court's decision in *Peck v. Jenness*, 7 How. 612 (1894) that a court will not enjoin similar proceedings in another court. While this may be true as a general principle of law (*see*, 28 U.S.C. §2283), the Congress of the United States has fashioned a specific exception for statutory interpleader cases. This is a statutory interpleader case. Section 2361 of Title 28 states:

> "In any civil action of interpleader . . . under Section 1335 . . . . a district court may . . . enter its order restraining them [the claimants] from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court."

The issuance of a temporary restraining order or injunction under this section is discretionary. *Commerce & Industry Ins. Co. v. Cablewave Ltd.*, 412 F.Supp. 204 (S.D.N.Y. 1976); 7 Wright & Miller, *Federal Practice and Procedure*, §1717. The Tenth Circuit has simply upheld the District Court's exercise of its discretion. The Tenth Circuit's action is certainly not contrary to the specific provision of §2361 allowing injunctions to prevent the prosecution of a state court proceeding affecting the property involved in the interpleader action. This is all that the District Court did in the present case. At the resolution of the matter concerning the property deposited into the District Court, the District Court denied respondent Champlin's motion for a permanent injunction forbidding the petitioners from instituting or prosecuting the state court action. (Petitioners' Appendix, pp. 18a–19a). Respondents did not appeal the District Court's denial of a permanent injunction. The petitioners are now perfectly free to resume prosecution of their state court proceeding, and, in fact, have done so.

Actions for statutory interpleader, therefore, are an exception to the well-recognized rule against issuing injunctions to stay state court proceedings. *Holcomb v. Aetna Life Ins. Co.*, 228 F.2d 75 (10th Cir. 1955), *cert. denied*, 350 U.S. 986, *rehearing denied*, 350 U.S. 1016; 3A *Moore's Federal Practice*, ¶22.13 at p. 3103.

Brillhart v. Excess Ins. Co. of America, 316 U.S. 491 (1942), is not on point. *Brillhart* was an action for declaratory judgment under the Declaratory Judgments Act and based on diversity of citizenship. Furthermore, in *Brillhart*, the Supreme Court specifically found that another proceeding was pending in a state court in which all the matters in controversy between the parties could be fully adjudicated. The Court of Appeals had held that the dismissal of the federal suit was an abuse of discretion and reversed the district court judgment with directions that the district court proceed to a determination on the merits. The Supreme Court reversed the Court of Appeals, and remanded to the district court for an exercise of its discretion. *Brillhart*, therefore, is not contrary to the decisions of the District Court and the Tenth Circuit. If relevant at all, *Brillhart* reinforces the correctness of the Tenth Circuit decision.

The Tenth Circuit decision does not conflict with decisions of this Court.

D. The Tenth Circuit Decision Is Not In Conflict With Other Decisions of the Tenth Circuit.

Petitioners argue that the decision of the Tenth Circuit below is contrary to other decisions of the Tenth Circuit, namely, *Miller v. Miller Auctioneers, Inc. v. G. W. Murphy Industries, Inc.*, 472 F.2d 893 (10th Cir. 1973); *Knoll v. Socony Mobil Oil Co., Inc.*, 369 F.2d 425 (10th Cir. 1966), *cert. denied* 386 U.S. 977. The Tenth Circuit found no conflict between those cases and its decision. In fact, the Tenth Circuit distinguished *Miller, supra*, on the ground that in *Miller* the stakeholder had not deposited all the funds in its possession. (Petitioners' Appendix, pp. 4a, 5a).

Assuming *arguendo* that there is a conflict in the Tenth Circuit between its decision below and past decisions, the

existence of this *intra-circuit* conflict does not provide grounds for certiorari. Stern & Gressman, *Supreme Court Practice* (4th Ed. 1969), §4.6. Petitioners confuse *intra-circuit* conflicts with *inter-circuit* conflicts. The existence of an *inter-circuit* conflict is a proper reason for the Supreme Court's granting of a writ of certiorari. Rule 19, Supreme Court Rules. *Intra-circuit* conflicts, on the other hand, are properly resolved through rehearings en banc before the Court of Appeals. Federal Rules of Appellate Procedure, Rule 35(a); *Wisniewski v. United States*, 353 U.S. 901 (1957); *North Carolina Utilities Comm. v. F.C.C.*, 552 F.2d 1036 (4th Cir. 1977); *Ellis v. Carter*, 291 F.2d 270 (9th Cir. 1961). Petitioners never requested a rehearing en banc, nor did the petitioners ever suggest in their petition for rehearing that there was a conflict between the decision of the Tenth Circuit below and prior decisions of that Court.

E. The Court of Appeals Has Not Decided a Relevant Question of State Law in a Way Conflicting with Its Own Decisions and Local Decisions of the Texas State Courts.

Petitioners content that the Tenth Circuit's holding that the division order in question was a binding contract until revoked conflicted with the Tenth Circuit's own decision in *Craig v. Champlin Petroleum Co.*, 421 F.2d 236 (10th Cir. 1970) and with the Texas decision of *Butler v. Exxon Corp.*, 559 S.W.2d 410 (Tex.Civ.App. 1977). This is nonsense. First of all, the Tenth Circuit in its decision below never held that division orders in Texas were binding until revoked. The Tenth Circuit merely held that the petitioners had knowledge of the parties' construction placed upon the contract of sale of gas through the petitioners' execution of the division orders. (Petitioners' Appendix, pp. 6a–7a). Nowhere in the Tenth Circuit decision is there found a holding that the division orders were binding until revoked. This Court certainly should not resolve an issue not presently relevant or in controversy.

In any event, it should be noted that *Craig* construed Oklahoma, not Texas, law. Decisions of both the Fifth Circuit Court of Appeals (applying Texas law) and the Supreme Court of Texas have held that division orders are binding until revoked. *Chicago Corp. v. Wall*, 293 S.W.2d 844 (Tex. 1957); *Pan American Petroleum Corp. v. Long*, 340 F.2d 211 (5th Cir. 1964). *See also, Le Cuno Oil Co. v. Smith*, 306 S.W.2d 190 (Tex.Civ.App. 1957).

The Supreme Court of the United States is certainly not a proper forum to adjudicate asserted conflicts of interpretation of state law when such purported conflicts are not now relevant to the lower court's determination of the issues. The clear policy of this Court is to decline review where a court of appeals has reached a reasonable and permissible result based on state law. Stern & Gressman, *Supreme Court Practice*, (4th Ed. 1969), §4.10.

The cases of *Cleveland v. Ward*, 285 S.W. 1063 (Tex. 1926), a case involving conflicts of jurisdiction among Texas state courts, *Lewis v. Pitts*, 275 S.W. 473 (Tex.Civ.App. 1925), a case involving title to real property, and *Ackerman v. King*, 29 Tex. 291 (1867), a case involving the effect of a preceding federal admiralty suit on a subsequent state action for money, are totally irrelevant to the issues at hand. The question of a federal court staying the interpleader suit while a pending state action proceeds is a matter of federal, not state, law. *cf., Coastal Air Lines v. Dockery*, 180 F.2d 874 (8th Cir. 1950) (§1335 interpleader procedure).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAILING

I hereby certify that I have mailed true and correct copies of the foregoing "Joint Brief For Respondents In Opposition," by U.S. mail, postage prepaid, to the following:

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this 23rd day of May, 1978.

Rules Dorwart